

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Industrial Tower  
and Wireless, LLC

v.

Civil No. 08-cv-122-JL  
Opinion No. 2009 DNH 121

Town of Epping and  
Jane Burley

O R D E R

Industrial Tower and Wireless has sued the Town of Epping, claiming that its planning board's decision denying Industrial a conditional use permit for a wireless telecommunications tower in the Town violates § 704(a) of the Telecommunications Act of 1996 because the decision is not "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(a)(7)(B)(iii). This court has jurisdiction over this claim under 28 U.S.C. § 1331 (federal question).

Industrial moves for summary judgment on this claim.<sup>1</sup> The Town and Jane Burley--whose property abuts the proposed tower site and who was therefore allowed to intervene as a defendant in

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<sup>1</sup>Industrial also claims that the decision prohibits or has "the effect of prohibiting the provision of personal wireless services," 47 U.S.C. § 332(a)(7)(B)(i)(II), also in violation of the Act, and seeks judicial review of the planning board's decision, as authorized by New Hampshire law, N.H. Rev. Stat. Ann. § 677:15. Industrial has not moved for summary judgment on either of these claims.

this matter, see Fed. R. Civ. P. 24(a)(2)--object. After oral argument, Industrial's motion is denied because, as explained fully infra, substantial evidence supports the board's decision that the existing state police tower in the Town is a "feasible" alternative to Industrial's proposed site, either alone or in conjunction with a shorter tower at Industrial's proposed site. Furthermore, in light of this ruling, Industrial is ordered to show cause why summary judgment should not enter against it on its substantial evidence claim.

**I. Background**

Industrial applied to the Epping Planning Board for a conditional use permit for a 150-foot wireless communications monopole tower to be located on an otherwise unimproved, heavily forested parcel at 103 High Road in the Town. Industrial's application cited gaps in cellular coverage along stretches of Routes 125, 152, and 155. Route 125 runs roughly north-south through the center of Epping, from its southern border with Brentwood to its northern border with Lee. About one half-mile before the Lee town line, Route 155 branches off of Route 125, and both roads continue to run northward into Lee, where, within about one mile, each intersects with Route 152. Route 152 runs roughly east-west through Lee, never entering Epping. The

proposed tower site sits just west of the intersection between Routes 125 and 155, just south of the Lee town line.

The site also sits in the rural residential zone on Epping's zoning map. Under the Town's "Personal Wireless Services Facilities Ordinance," Article 20 of its zoning by-laws (the "Ordinance"), "[g]round-mounted personal wireless services facilities" (like Industrial's proposed tower) in this zone are limited in height to "ten feet above the average tree canopy height, measured from average ground level." Because Industrial's proposed tower would have exceeded this height limitation by between 80 and 90 feet,<sup>2</sup> Industrial sought a variance from the Town's Zoning Board of Adjustment, which was granted, and later upheld against a challenge by Burley in the state superior court.

The Ordinance also provides that "[a] personal wireless service facility shall require a conditional use permit in all cases." So, to proceed with the tower, Industrial sought such a permit from the Town's planning board.<sup>3</sup> The Ordinance sets forth

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<sup>2</sup>This limitation applies where there are no buildings within 300 feet, which is the case at the proposed site.

<sup>3</sup>While stopping short of arguing that the variance eliminated any need for a conditional use permit, Industrial has argued that, since the variance relieved it from complying with the height requirement, the planning board could not require Industrial to consider a lower tower as a condition of the

a number of standards which "must be met and/or impacts mitigated to the satisfaction of the Planning Board prior to the granting of a Conditional Use Permit." The Ordinance groups these standards into a number of categories, including "Location" and "Co-location." The Ordinance also explains that it was "enacted in order to effectuate the following goals and standards," including to "[r]educe adverse impacts [personal wireless service] facilities shall create, including but not limited to; impacts on aesthetics," and to "[r]equire the configuration of [personal wireless service facilities] in such a way that minimizes the visual impact."

In relevant part, the "Location" standards, set forth in section VI(b), provide that:

- 1) If feasible, personal wireless service facilities shall be located on existing structures, including but not limited to . . . existing telecommunications facilities, utility poles and towers, and related facilities, provided that such installation preserves the character and integrity of those structures . . . . The applicant shall have the burden of proving that there are no feasible existing structures upon which to locate.

As set forth in section VI(c), the "Co-location" standards provide, also in relevant part:

- 1) Licensed carriers shall share personal wireless services facilities and sites where feasible and

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permit. See infra note 12.

appropriate, thereby reducing the number of personal wireless facilities that are stand-alone facilities.

2) In the event that co-location is found to be not feasible, a written statement of the reason for the infeasibility shall be submitted to the Town.

During the public hearings before the planning board on Industrial's application, it was suggested that, rather than constructing the single proposed 150-foot tower at 103 High Road, Industrial could proceed with a shorter tower at that site in connection with another shorter tower at a different site, potentially the existing communications tower at the state police barracks in the Town or other locations along Route 125. The state police tower is located roughly 2.2 miles to the southeast of the proposed 103 High Road site and sits in the Town's wireless overlay zone (coterminous with the Town's highway commercial and industrial commercial zones), where the Ordinance permits personal wireless facilities up to 150 feet high.

Industrial's application had stated that the existing state police tower was not a feasible location under §§ IV(b)(1) and IV(c) of the Ordinance because it "is approximately four miles from the [103 High Road] site and does not meet the [radio frequency] requirements needed to remedy the existing coverage gap." Industrial also included a map projecting the coverage from the state police tower, which would not reach the

intersection of Routes 125 and 155 in northern Epping--falling roughly 1.1 miles short of that point--nor any part of Route 152 as it passes through Lee. Coverage from the state police tower would, however, blanket an area in roughly the geographical center of Epping, including the intersection of Route 125 and Route 27, which runs east-west through the Town. That intersection also lacks sufficient wireless coverage, as shown by Industrial's own submissions.

The board subsequently received a report from David Maxson, a "municipal wireless consultant" retained by Burley. Maxson explained that his business, Broadcast Signal Lab, has "provide[d] assistance to well over one hundred municipalities in all manner of wireless facility siting activities, including permit application review . . . and expert testimony in federal court on wireless matters." In relevant part, Maxson's report disagreed with Industrial's view that the state police tower was not a feasible location, pointing out that it "is a little over two miles from the proposed [103 High Road] site, not four. This is close enough to suggest it could exert substantial influence on a large portion of Route 125 coverage in Epping," based Industrial's own propagation study. Thus, Maxson concluded, "[w]hile the State Police Tower does not directly substitute for

the coverage of the proposed tower . . . it would provide enough coverage in Epping to eliminate the need for the proposed tower."

Maxson also concluded that "the combination of the State Police Tower, the existing American Tower facility [located in southern Epping] and a hypothetical 80-foot pole in the north of Epping would provide significantly better coverage in Epping than the proposed tower." In support of this conclusion, Maxson submitted a propagation map showing the coverage from those existing facilities combined with that from an 80-foot pole at a particular location in northern Epping near the 103 High Road site. Maxson further noted, as another alternative, that "the use of a tall tower in the Wireless Overlay District could contribute significantly to improved . . . coverage along Route 125 in Epping."

Industrial provided the planning board with a response to Maxson's report, stating, in relevant part:

The State Police tower has been the subject of much debate at several of the [planning board] meetings. The plain and simple truth is that the State Police tower will not provide a sufficient signal to fill in the coverage gap within the town of Epping. Additional reasons why the site will not work are provided in the attached Tower Consultants, Inc. (TCI) letter. TCI brings decades of knowledge and experience in the tower industry and specialize [sic] in tower structure analysis. The letter states that the tower will not be adequate structurally to support additional load capacity of multiple carriers' antenna equipment.

The attached letter from TCI states, "Per the limited information provided to [Industrial] on" the "120 foot Guyed Tower" at the state police barracks, which "exclud[ed] any usable information on the foundations, it is our opinion that the tower will not be adequate, structurally to support up to five (5) wireless carriers" under the applicable design standard.

Though, based on counsel's representations at oral argument, there were five wireless carriers in business at this time, no more than two had ever expressed interest in locating on Industrial's proposed tower. And Industrial had described the state police tower as 150 feet tall--not 120 feet tall--in the propagation study submitted with its application. Maxson later told the board that, while TCI had analyzed the tower as 120 feet tall and just 18 inches across, it actually measures 160 feet tall and 3 feet across.

Explaining that it had "solicited information from various sources to determine whether other companies have been successful at collocating on State Police facilities," Industrial also submitted a letter from a principal at KJK Wireless, a business with ten years' experience developing wireless towers in New Hampshire. The author stated that, in his experience, "collocation on New Hampshire Public Safety telecommunications facilities is not allowed," due to "the potential compromise to

public safety and national security communications" and that he was "not aware of any wireless carriers being collocated on public safety towers in New Hampshire."

Maxson and Burley, though, provided the board with information to the contrary. Maxson said it was "false" that state police towers "are not available to the private sector." Burley reported that the head of the state police had told her "that he would be willing to entertain wireless on his tower and referred her to the communications director who explained an engineering study would have to be done and offered to help in any way her [sic] could for other carriers to be on their tower."

Industrial's response also questioned Maxson's suggestions for locating a tower elsewhere. Industrial explained that the sites identified in Maxson's report were inappropriate for a variety of reasons: they are "too far south of the coverage gap," or would result in "an excessive and impractical amount of coverage overlap" with other existing wireless facilities, or have wetlands or other geographical features requiring variances, obstructing access, or both. Industrial also pointed out that it had considered more than eighty different parcels in the Town as part of "an exhaustive search for viable locations."

In its written decision denying a conditional use permit for the proposed tower, the board found that Industrial's application

did not meet certain standards set forth in the Ordinance. Specifically, the board found that, in violation of § VI(b)(1), Industrial "failed to explore a new tower with multiple collocations at the State Police Barracks" and, relatedly, in violation of §§ VI(c)(1) and (2), Industrial "failed to consider alternative heights, alternative and innovative siting techniques, and collocation options on existing structures."<sup>4</sup> The board also found that "the applicant failed to address the option of a lower height to the tower to minimize impacts as detailed in the ordinance," reasoning that "a lower tower was a reasonable alternative" if "developed in conjunction with another site," such as the police tower.

## **II. Applicable legal standard**

Under the TCA, "[a]ny decision by a . . . local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). This provision

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<sup>4</sup>The board also found that, in violation of § IV(b)(4), Industrial "failed to present options for camouflaging the structure with use of flush mounts, internal mounts, or other methods." Because neither the Town nor Burley relies on this finding in defending the board's decision, however, the court need not consider it.

"does not create a substantive federal limitation upon local land use regulatory power," Sw. Bell. Mobile Sys., Inc. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001), but "is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable zoning requirements." ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002) (quotation marks omitted).

The court of appeals has instructed that the TCA's substantial evidence standard, though "highly deferential, is not a rubber stamp." Todd, 244 F.3d at 58-59; see also Town of Amherst v. Omnipoint Commc'nns Enters., Inc., 173 F.3d 9, 16 (1st Cir. 1999) ("The substantial evidence test . . . involves some deference but also has some bite."). The standard, which is "the same as that traditionally applicable to a review of an administrative agency's findings of fact," Todd, 244 F.3d at 58, "does not mean a large or considerable amount of evidence," or even a preponderance of the evidence, just "more than a scintilla of evidence." ATC Realty, 303 F.3d at 94-95 (quotation marks omitted). Indeed, substantial evidence is simply

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The reviewing court must take into account contradictory evidence in the record. But the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Todd, 244 F.3d at 58 (quoting Penobscot Air Servs., Ltd. v. FAA, 164 F.3d 713, 718 (1st Cir. 1999)).

The substantial evidence standard does not allow a court to "uphold a board's denial of a permit on grounds that it did not present in its written decision." Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 22 (1st Cir. 2002). It does not follow, however, that judicial review of a board's decision is limited "only to the facts specifically offered in the written decision." Todd, 244 F.3d at 60. So a reviewing court can rely on evidence from the written record supporting the board's stated reasons for its decision, even if the board itself did not. See id.; see also Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 627 (1st Cir. 2002) ("an instance in which the district court reviewed the record developed by the Board and provided more detail than did the Board in its decision . . . is entirely in accordance with the [TCA]").

### **III. Analysis**

Industrial argues that the reasons given by the planning board in its written decision denying a conditional use permit for the proposed tower are unsupported by substantial evidence in the record. As just noted, the planning board found that Industrial violated § VI(b)(1) of the Town's Personal Wireless

Ordinance, requiring that, “[i]f feasible, personal wireless service facilities shall be located on existing structures,” because Industrial “failed to explore a new tower with multiple collocations at the State Police Barracks.”<sup>5</sup>

As an initial matter, the court rejects the premise of Industrial’s principal challenge to the decision: that an alternative to a proposed wireless facility can never be “feasible” unless it provides coverage that fills the same gap or, as Industrial put it bluntly at oral argument, that providers “have a right to fill the gap they choose.”<sup>6</sup> That is not the law. “Under the TCA, local governments retain control ‘over decisions regarding the placement, construction, and modification

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<sup>5</sup>Despite the reference in this passage to a “new” tower at the state police barracks, the parties have taken the board’s decision in this respect to rely on Industrial’s alleged failure to use the existing tower there, either on its own or in conjunction with another, shorter tower elsewhere in the Town. The court will do the same.

<sup>6</sup>When pressed by the court, Industrial backed off this position somewhat, arguing that, at the least, it was entitled to a location from which coverage would “substantially” close the gap. As discussed infra, while the degree to which coverage from an alternative site closes a gap certainly bears on whether that site is “feasible,” neither that standard under the Ordinance nor the substantial evidence test under the TCA entitles the provider to any particular degree of overlap. Cf. Town of Amherst, 173 F.3d at 15 (declining to “decide now whether and to what extent legitimate zoning requirements could require a carrier to accept a wireless system that is functional but offers less than perfect performance” despite the TCA’s effective prohibition rule).

of personal wireless services.'" Todd, 244 F.3d at 57 (quoting 47 U.S.C. § 332(c)(7)(A)). Accordingly, "developers of wireless networks are not entitled to locate facilities wherever they wish to, nor are local governments required to approve the 'best' or most economical siting proposals, so long as permit denials are given in writing and are supported by substantial evidence in the record." ATC Realty, LLC v. Town of Sutton, 2002 DNH 057, 30 (citing Town of Amherst, 173 F.3d at 14-15).

Industrial is wrong, then, that the TCA prohibits a town from rejecting a proposed wireless facility based on potential alternative sites offering lesser impacts unless those sites close the same coverage gap as the site proposed. See Todd, 244 F.3d at 63. Rather, "[f]or a telecommunications provider to argue that a permit denial is impermissible because there are no alternative sites, it must develop a record demonstrating . . . that the alternatives are not feasible to serve its customers." Id. (emphasis added). The term "feasible"--which, not coincidentally, is the same term that appears in § VI(b)(1) of the Ordinance here--means simply "capable of being done, executed or effected: possible of realization." Webster's Third New International Dictionary 831 (2002).

So a facility at an alternative site can be "feasible to serve [a provider's] customers" even if it does not close an

identified coverage gap all, or even most of, the way that a facility at the provider's proposed site would. Cf. Nextel Commc'ns of Mid-Atl., Inc. v. City of Cambridge, 246 F. Supp. 2d 118, 125 (D. Mass. 2003) (observing that a decision "might have been on shakier ground" if the proposed site "genuinely was [the provider's] only option, and that the proposal was necessary to close a 'significant' coverage gap"). Linguistic niceties aside, a contrary rule would effectively strip local authorities of their "wide latitude in deciding questions related to the siting of telecommunication facilities." ATC Realty, 2002 DNH 057, at 26 (citing Town of Amherst, 173 F.3d at 15); see also 47 U.S.C. § 332(c)(7)(A). Instead, municipalities would be wholly precluded from considering alternatives that, while offering reduced impacts vis-a-vis the provider's proposed location, did so only at the cost of leaving a larger gap in coverage. In contrast, as the court of appeals has instructed, these sorts of cost-benefit analyses "are in the realm of trade-offs . . . subject to an outer limit, such choices are just what Congress has reserved to the town." Town of Amherst, 173 F.3d at 15.

The board's decision thus did not transgress the TCA's "outer limit" simply because it relied on the feasibility of an alternative location unable to offer precisely the same coverage as the 103 High Road site. There is no dispute that locating a

facility on the state police tower would leave a portion of the gap in question without coverage, but that portion would extend only about one and one-half miles along Route 125 through its intersection with Route 155 and northward to the Lee line--at least insofar as that portion lies along major roads within the Town of Epping. A larger part of the gap would remain across the Epping town line, in Lee, but, as the Town points out, "[n]othing in the . . . [O]rdinance or in the TCA requires the local zoning authority to permit the construction of a facility within its community in order to service neighboring jurisdictions."<sup>7</sup> USCOC of N.H. RSA No. 2 v. Town of Hopkinton, 137 F. Supp. 2d 9, 17-18 (D.N.H. 2001) (citing cases).<sup>8</sup>

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<sup>7</sup>In its reply, Industrial complains that "the Planning Board's decision did not take into account the coverage flowing into neighboring towns, and therefore, its is not a valid basis for upholding the Board's decision on this appeal" (footnote omitted). The premise of that argument is flawed, as explained infra at 26.

<sup>8</sup>At oral argument, Industrial characterized the Town's suggestion that it should not have to host wireless facilities which serve other towns as "chutzpah," particularly in light of a provision in the Ordinance requiring, "where technically feasible, co-location and minimal siting options through an assessment of . . . siting possibilities beyond the political jurisdiction of the Town." The court of appeals has recognized, however, that "it may be possible to provide an adequate level of personal wireless services to a particular community solely through facilities located outside that community," rejecting the argument "that this result would allow [a town] to displace onto other jurisdictions the obligation to host new cell towers" as "contrary to the TCA's emphasis on protecting the interests of

Moreover, unlike the coverage from Industrial's proposed site, coverage from the state police tower would extend through Epping's commercial center, including the major intersection of Routes 125 and 27. The board, as just discussed, was entitled to weigh this advantage of siting the new facility on the existing police tower against the corresponding disadvantage, i.e., leaving a coverage gap in part of northern Epping, chiefly along the last one and one-half mile stretch of Route 125.

As the board recognized, another such advantage is minimizing the aesthetic impact of a new wireless facility by locating it on an existing structure, and in the wireless overlay district. “[L]imitations upon local authority in the TCA do not state or imply that the TCA prevents municipalities from exercising their traditional prerogative to restrict and control development based upon aesthetic considerations.” Todd, 244 F.3d at 61. Here, in addition to these “traditional prerogatives,” the Ordinance’s stated “goals and standards” include “[r]educ[ing] adverse impacts [personal wireless service

consumers and residents rather than those of carriers and developers.” Second Generation Props., 313 F.3d at 632. While the court warned that it “would view very differently a case in which a town attempted to deflect onto another jurisdiction the need to build new towers necessary to provide services to meet the TCA’s goals where no service has been provided,” id. at n.12, that is not this case; the board’s decision relied on the feasibility of alternative sites in Epping, not elsewhere.

facilities] may create, including . . . impacts on aesthetics" and "[r]equiring, where technically feasible, . . . minimal impact siting options."

Substantial evidence supports the board's decision that, when these benefits are weighed against the detriment of a larger remaining coverage gap in the northern part of the Town, siting a new facility on the state police tower is a feasible alternative to siting it at 103 High Road. As one court has observed,

A reasonable decision whether to approve the construction of an antenna for cellphone communications requires balancing two considerations. The first is the contribution that the antenna will make to the availability of cellphone service. The second is the aesthetic or other harm the antenna will cause.

PrimeCo Personal Commc'ns, Ltd. P'ship v. City of Mequon, 352 F.3d 1147, 1149 (7th Cir. 2003) (Posner, J.). Viewed in this light, the board's decision was "reasonable," i.e., within the "outer limit" of the substantial evidence standard.

In any event, even if Industrial were correct that an alternative site for a wireless facility cannot be "feasible" unless it fills the same gap as the proposed site, there was substantial evidence that using the existing police tower in conjunction with a new--but shorter--tower at the 103 High Road site would satisfy that standard. There is no dispute that, as Maxson concluded, "the combination of the State Police Tower, the

existing American Tower facility and a hypothetical 80-foot pole in the north of Epping would provide significantly better coverage in Epping than the proposed tower.”<sup>9</sup>

Industrial nevertheless argues that Maxson’s conclusion does not amount to substantial evidence. First, Industrial dismisses it as “surmise[]” or “conjecture,” but Maxson supported his statement with a propagation map showing the composite coverage from all three facilities.<sup>10</sup> Though Industrial, in its reply

<sup>9</sup>In light of this evidence, Industrial’s reliance on USCOC of N.H. RSA #2 v. City of Franklin, 2005 DNH 172, is unavailing. There, the local zoning board rejected a proposed tower because, in addition to concerns over reduced property values, see infra note 14, the applicant failed to show the inadequacy of alternative sites. 2005 DNH 172, 18-19. Because the only evidence on this point were the applicant’s own propagation studies showing that towers at those sites would not close the identified coverage gap, however, this court ruled that the board’s decision was not supported by substantial evidence. Id. at 23. Here, in contrast, Maxson’s propagation study demonstrated that the combined coverage from his proposal would exceed that from Industrial’s proposal, at least in Epping.

<sup>10</sup>The court recognizes that, in Maxson’s propagation study, the “hypothetical 80-foot pole in the north of Epping” was not located at the 103 High Road site, but at another parcel nearby, and that, in its response to Maxson’s report, Industrial recited difficulties in using that parcel, including the presence of wetlands and the availability of access (at least to the point on the parcel used for Maxson’s propagation study) only by crossing adjacent land owned by Burley. Nowhere in Industrial’s motion papers, however, does it argue that this information undermines the board’s finding that a shorter tower at the nearby 103 High Road site would, in combination with the state police tower, present a feasible alternative to Industrial’s proposed 150-foot pole. Such an argument is hard to imagine, given the close proximity of Industrial’s proposed site and Maxson’s hypothetical

brief, complains that "Maxson is not a radio frequency engineer," his report to the board states that his propagation analysis is "based on the Longley-Rice model published by the United States [G]overnment Institute for Telecommunications Science as the Irregular Terrain Model" (parentheticals omitted) as well as that his business had assisted more than one hundred municipalities "in all manner of wireless siting activities" over the past twenty years. Given this foundation, the board could have properly treated Maxson's conclusion as to the coverage from the combined facilities as part of the substantial evidence supporting its denial of Industrial's application.<sup>11</sup> See infra note 15 and accompanying text.

Second, Industrial complains that Epping's Personal Wireless Services Ordinance "does not require, and the Planning Board may not require, applicants to consider co-location in combination

one (to say nothing of the fact that the difficulties at that parcel cited by Industrial do not appear insurmountable by any means), but, in any event, the court need not consider it. See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 260 (1st Cir. 1999).

<sup>11</sup>"Especially in administrative adjudication, there is no magical set of procedures for designating someone as an expert witness." Chao v. Gunite Corp., 442 F.3d 550, 559 (7th Cir. 2006). Maxson's significant experience in the field would seem to do the trick, even if the rigorous standards of Rule 701 of the Federal Rules of Evidence applied in proceedings before a local land use board (which they do not, see infra note \_\_).

with the construction of new facilities." But, as is clear by now, § VI(b)(1) of the Ordinance does require the location of personal wireless facilities on existing structures "[i]f feasible"--a standard that, neither textually nor contextually, excludes siting a facility on an existing structure in conjunction with siting one on a new structure. In any event, there was evidence before the board that combining a facility at the state police tower with an 80-foot pole near the proposed 103 High Road site was not only a feasible alternative to a 150-foot tower there, but a preferable one, at least in some respects.

For one thing, as Maxson pointed out, the combined facilities would provide coverage along Route 125 not only northward through its intersection with Route 155 near the town line, but also southward through Route 125's intersection with Route 27, in the town center--a gap that, again, Industrial's proposal would have left unfilled. For another, while an 80-foot pole at the 103 High Road site would not have completely eliminated the aesthetic impacts of such a structure, it would have lessened them by bringing the tower's height down to a level consistent with that of the surrounding trees. The board found, again, that Industrial's proposal did not "address the option of a lower height of the tower to minimize impacts as detailed in the [O]rdinance." As just discussed, the comparative aesthetic

impacts of the proposed tower and its alternatives was a factor the board could have legitimately considered, under both the Ordinance and the TCA, in finding alternatives "feasible."<sup>12</sup> See Todd, 244 F.3d at 62 (upholding a decision rejecting a tower "of a different magnitude than anything else in the vicinity" and "out of keeping with the residential uses in close proximity").

Furthermore, in addition to demanding minimal aesthetic impacts generally, the Ordinance's stated "goals and standards" also specifically "[r]equire the configuration of [a personal wireless service facility] in a way that minimizes the adverse

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<sup>12</sup>In its reply brief, Industrial argues that, by virtue of the height variance from the zoning board, the planning board "acted without legal authority in requiring Industrial to propose a cell tower of a lower height." This court typically disregards arguments raised for the first time on reply. See, e.g., Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 303 n.16 (D.N.H. 2008). In any event, the Ordinance explicitly states that "[a] personal wireless service facility shall require a conditional use permit in all cases" and, again, one of the standards for such a permit is the absence of feasible existing structures; Industrial does not claim to have gotten a variance from that provision of the Ordinance.

This court cannot rule, then, that the planning board's decision is not "consistent with the applicable zoning requirements" and therefore not supported by substantial evidence, ATC Realty, 303 F.3d at 94, simply because the board identified a feasible alternative incorporating a lower tower than Industrial had been permitted to erect by the zoning board. The court expresses no view on whether the planning board's approach was consistent with state land use law, because, as Burley points out, no such claim is before the court.

visual impact of the facilities and antennas.”<sup>13</sup> One way to accomplish this, as the board recognized, is to reduce the height of a proposed new structure while compensating for that reduction, and the corresponding reach of the structure’s coverage, by also siting on an existing structure elsewhere. In Town of Amherst, in fact, the court of appeals noted that substantial evidence likely supported the finding “that a feasible system could be constructed of [several] very short towers” rather than the proposed single 190-foot tower, despite the carrier’s views “that even from an aesthetic standpoint, its solution [was] best” or more “efficient.” 173 F.3d at 15. So, despite Industrial’s protest here, the board had the authority, under both the Ordinance and the TCA, “to consider co-location in combination with the construction of new facilities.”

Industrial also argues that, regardless of the coverage attainable from the state police tower, it was still not feasible because (1) the tower is structurally inadequate and (2) the state police would not allow a wireless carrier to locate on the

<sup>13</sup>In its reply brief, Industrial relies on another of the Ordinance’s stated “goals and standards,” i.e., to “[r]equire cooperation and co-location, to the highest extent possible, between competitors in order to reduce cumulative negative impacts upon the Town of Epping.” But this provision does not prohibit other ways “to reduce cumulative negative impacts,” such as requiring the use of a relatively short new tower in combination with an existing structure where feasible.

tower. While Industrial certainly supplied the board with evidence supporting its position on each of these points, the board also received evidence to the contrary.

Taking the second point first, Burley provided the board with information disputing Industrial's view. Characterizing this information as mere "discourse on the remarks of a State Police officer concerning the Department of Safety's relative receptiveness to negotiation" (bracketing omitted), Industrial deems it "hardly competent evidence" and therefore not "'substantial evidence' supporting the Board's decision."

What Burley actually told the board was that "Colonel Booth[,] head of the [D]ivision of the State Police"--not just any "State police officer"--responded to her inquiry not only by telling her that "he would be willing to entertain wireless on his tower," but also by referring her to "the communications director who explained an engineering study would have to be done and offered to help in any way"--not just "relative receptiveness to negotiation." So Burley's account provides substantial evidence for the board's finding "that the Police would be open to discussing the possibility of collocation" and that their existing tower was therefore a feasible alternative.<sup>14</sup>

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<sup>14</sup>Industrial relies on this court's decision in City of Franklin for the proposition that, under the TCA, "to be

The board likewise had before it substantial evidence to find that installing a wireless facility on the state police tower was feasible despite Industrial's stated concern about the tower's structural integrity. Industrial asserted that the state police tower "will not be adequate structurally to support additional load capacity of multiple carriers' antenna equipment," submitting a letter from TCI which opined that "the tower will not be adequate, structurally, to safely support up to five (5) wireless carriers."

But there was no evidence before the board that five carriers were planning on locating on Industrial's proposed tower; no more than two carriers, in fact, had expressed interest in doing so. TCI's opinion, then, did not prevent the board from

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sustainable . . . fact finding must be based on competent evidence." Id. at 17-18. There, the provider supplied studies showing that wireless towers do not cause nearby property values to decline, but the local board rejected them based "on generalized and unsupported concerns of local residents," id. at 18, rather than "any evidence suggesting that wireless communications towers cause nearby property values to decline in general, or that the installation of towers have [sic] affected property values in [the town] differently than in other communities analyzed in [the provider's] reports," id. at 17. The board's approach, this court found, did not satisfy the substantial evidence test. Id. at 18. Here, in contrast, the board received information from Burley specifically contradicting Industrial's view that the state police would not allow placement of a private wireless facility on the tower. That evidence was "competent" as this court used the term in City of Franklin.

finding that locating those two carriers on the state police tower, instead of the proposed new tower, would be feasible.

Industrial also attacks the Town's reliance on Maxson's telling the board, in effect, that TCI "evaluated the wrong type of tower," because the board "did not make any such finding." Nor, for that matter, did the board make a finding that only two carriers intended to locate on Industrial's proposed tower, but such subsidiary findings are not essential to upholding, under § 332(c)(7)(B)(iii), the board's ultimate finding that the police tower was a feasible alternative. The TCA requires only "a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." Todd, 244 F.3d at 60. It does not demand "a statement of findings and conclusions, and the reasons or basis thereof," id. at 59–60 (quotation marks and ellipses omitted), or prevent the court from locating on its own, or with the assistance of the parties, evidence in the record which supports the stated reasons for the board's denial but was not specifically referenced in its written decision. Second Generation Props., 313 F.3d at 627.

Industrial also attacks Maxson's statement as "unsubstantiated," because he "provided no evidence of the State Police Tower's height or width" (footnote omitted). Maxson did,

in fact, specifically tell the board that "the police tower is [a] 160 feet [*sic*] tower nearly three feet across," so Industrial's argument seems to rely on the unstated proposition that the TCA's substantial evidence test incorporates a personal knowledge requirement. Industrial provides no authority for that view, which, if accepted, would dramatically transform the local permitting process from public hearings into formal judicial proceedings in a manner not contemplated by the TCA.<sup>15</sup> Cf. Todd, 244 F.3d at 59. Indeed, it is enough to observe, as Burley points out, that Maxson's statement is no more devoid of "evidence" than TCI's letter, which refers to the state police structure as a "120 foot Guyed Tower" without articulating how

<sup>15</sup>In fact, "[i]t has long been settled that technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before . . . administrative agencies in the absence of a statutory requirement that such rules are to be observed." Opp Cotton Mills v. Adm'r, 312 U.S. 126, 155 (1941); see also, e.g., II Richard J. Pierce, Jr., Administrative Law Treatise §§ 10.3-10.4, at 711-731 (4th ed. 2002). As City of Franklin suggests, see note 14, *supra*, this is not to say that rank hearsay, wild speculation, or the like will satisfy the TCA's standard. Cf. Nat'l Tower, 297 F.3d at 24 n.4 (observing that a town "might well have been justified in finding insufficient an assertion based on information and belief" because "[s]uch a qualification would make [it] inadmissible, for example, to support summary judgment in federal court"). Maxson's statement as to the dimensions of the tower, though, is hardly in that category.

TCI knows that, apart from a reference to "the limited information provided to" Industrial.

In any event, the board received other evidence--in the form of the propagation study of the state police tower submitted by Industrial itself--that the structure measured 150 feet in height, not 120 feet as TCI claimed.<sup>16</sup> That inconsistency, if not alone than certainly in combination with TCI's unsupported assumption that any tower would have to support five different carriers, provided ample support for the board to disregard Industrial's protest over the state police tower's structural integrity and find that, nevertheless, it was a feasible site.

In sum, substantial evidence supported the board's finding that locating on the state police tower was feasible, either alone or in conjunction with a tower at the 103 High Road site shorter than the 150-foot structure proposed by Industrial. This is not to say that the board's decision was airtight, or that it could not have reasonably come out in Industrial's favor; but that is not the standard. "[I]f the issue is simply one of

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<sup>16</sup>A footnote in Industrial's reply brief states, "Adding height to the tower does not make it any safer." This may or may not be true as a matter of structural engineering, but the facts remain that (1) Maxson told the board that the state police tower was not only higher, but also wider than TCI had assumed, and (2) TCI also assumed, contrary to the record, that five different carriers would be placing equipment on the tower.

whether the board's decision is supported by substantial evidence, the courts defer to the decision of the local authority, provided that the local board picks between reasonable inferences from the record before it." Nat'l Tower, 297 F.3d at 22-23. The board did so here.

But the court of appeals has also cautioned that local zoning requirements which make defending substantial evidence claims under the TCA relatively easy--such as Epping's rule that there be no "feasible" existing alternatives--can also make defending effective prohibition claims under the TCA more difficult. See Town of Amherst, 173 F.3d at 16-17. And Industrial's effective prohibition claim remains (though the court expresses no view as to its merits at this point). So the parties here, like their counterparts there, "might find it prudent to discuss . . . an amicable resolution or an agreed upon procedure to achieve one." Id. at 17. This court, as always, is willing to offer its services to that end.

In the meantime, however, Industrial shall show cause by September 21, 2009, why summary judgment should not enter against it on its substantial evidence claim, since this court has denied summary judgment for Industrial on its claim to the contrary. "The substantial evidence question would ordinarily be resolved (one way or the other) on the record before the district court

and require no trial." Id. at 16. This appears to be the ordinary case but, if appearances are deceiving, Industrial can show how. Industrial shall not, however, use its response to the show cause order as an opportunity to reargue anything that was, or argue anything that could have been, argued in its motion papers or reply.

**IV. Conclusion**

For the foregoing reasons, Industrial's motion for summary judgment on its substantial evidence claim<sup>17</sup> is DENIED. Industrial shall show cause by September 21, 2009, why summary judgment should not enter against it on that claim.

**SO ORDERED.**



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Joseph N. Laplante  
United States District Judge

August 11, 2009

cc: Lawrence M. Edelman, Esq.  
Robert M. Derosier, Esq.  
John J. Ratigan, Esq.  
Jeffrey C. Spear, Esq.

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<sup>17</sup>document no. 22.